Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THEODORE H. FRIEDMAN,

Petitioner,

—v.—

DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an order of disbarment, based upon findings of fact supported by only a preponderance of the evidence rather than a higher standard of proof, denies the affected attorney the due process of law required by the Fourteenth Amendment.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

Petitioner, Theodore H. Friedman, petitions for a writ of certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, First Department, substantially confirming the Report of the Special Referee and ordering petitioner disbarred. The Court of Appeals of the State of New York dismissed petitioner's appeal as of right without reaching the merits of the case, upon the ground that the appeal presented no substantial constitutional question directly involved.

OPINIONS BELOW

The report of the Special Referee, which is unreported, is reprinted in the Appendix at 1a-26a. The *per curiam* opinion and order of the Appellate Division, First Department, also unreported, is reprinted at 27a-54a. The unreported order of the Court of Appeals of the State of New York is reprinted at 55a-56a. The order of the Appellate Division granting in minor part and otherwise denying a motion for reargument is reprinted at 57a.

JURISDICTION

The order of the Appellate Division, First Department, was entered on March 22, 1994. The order of the New York Court of Appeals was entered on May 5, 1994. A motion for reargument in the Appellate Division, dated April 5 and submitted April 21, 1994, was granted to the extent of changing two words in the opinion and otherwise denied on June 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).[1]

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[1] The time for appeal to the New York Court of Appeals would have expired on April 22, 1994, 30 days after the decision of the Appellate Division. N.Y. Civ. Prac. L. & R. 5513(a) (McKinney 1978). The notice of appeal was filed on April 6, 1994. Under New York practice, Civ. Prac. L. & R. 5517(a), the time for appeal is not extended by a motion in the lower court for reargument or similar relief. N.Y. Civ. Prac. L. & R. 5517(a) (McKinney 1978); David D. Siegel, *New York Practice* § 532, at 834 (2d ed. 1991). It is clear now, in any event, that the New York judgment is final.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that no State shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner, a member of the New York bar since 1957, has been ordered to be disbarred on findings of misconduct in two cases, one in 1982, the other in 1985. As stated by the Special Referee who made the adverse findings, petitioner

> is a lawyer of exceptional abilities and energies who has risen to the top of his profession. He has argued cases before the United States Supreme Court and is considered by his peers to be one of the finest, if not the finest, personal injury trial lawyer in New York.

It is also pertinent background here that (1) the first set of charges arose from a case in the United States District Court for the Southern District of New York where the result had been a letter of censure by that court in June, 1986, and (2) the second set of charges included centrally accusations of subornation of perjury on which petitioner had been tried and acquitted by a criminal jury in November, 1988. No findings of misconduct were made for any acts by petitioner during the years after 1985 when he conducted an active and prominent courtroom practice.

Since the question for review is the standard of proof, the lengthy record of disciplinary hearings, exceeding 4,000 pages of transcripts plus voluminous exhibits, may be summarized for present purposes with relative brevity:

In *Mowen v. Yangming Marine Transport Corp.*, 78 Civ. 5577, a wrongful death action in the Southern District of New York, there was sharp controversy over an exhibit offered by petitioner as plaintiff's counsel on the subject of damages. The trial judge ruled that petitioner could present the contents of the exhibit in final argument but that it would not be received in evidence and placed physically before the jury. Later, however, after the verdict, it was discovered that the exhibit had been placed in the jury room along with some 300 others requested by the jury. The judge ordered motion papers, and then testimony, on this subject.[2]

In an affidavit sworn March 8, 1982, petitioner stated that counsel assisting him at the trial, Frederick J. Cuccia, had been responsible for handling the exhibits and that Mr. Cuccia had therefore been the person who had (mistakenly) put the excluded exhibit in the pile to go to the jury. Mr. Cuccia, though served promptly with that affidavit, claimed he had not read it until months later, and that he then took sharp issue with petitioner's account. The dispute continued in a hearing before the trial judge, whose adverse conclusions resulted in multiple charges against petitioner before the federal court's disciplinary committee.

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[2] The summary regarding the *Mowen* case is taken largely from the Report of the Special Referee (2a-9a).

In the investigation required under the federal committee's procedures, petitioner admitted that he had identified Mr. Cuccia as having sent the exhibit to the jury room without having direct perceptual knowledge of that as a fact. He acknowledged that his affidavit reported as a fact an inference rather than direct knowledge. No other charges against petitioner were pressed, following full investigation.

In those circumstances, the federal disciplinary committee ordered that appellant be given a letter of censure, which was dated June 23, 1986.

The same events were then made the subject of six counts of wrongdoing charged by the Appellate Division's Departmental Disciplinary Committee. The first and most serious, alleging that petitioner had placed the exhibit in the jury room, was found by the Special Referee not to have been proved by a fair preponderance of the evidence. He went on, however, to find petitioner guilty on the five remaining counts -- the admitted charge of swearing an affidavit without personal knowledge, and other charges also relating to petitioner's statement about Mr. Cuccia's role in handling the exhibit found in the jury room.

The Appellate Division dismissed Count 3, alleging a recklessly false statement, for inconsistency with the charge of knowing falsity in Count 4. In all other respects it sustained the Referee's findings on the *Mowen* counts. In addition, though petitioner was found not to have put the exhibit in the jury room, the Court said he had "unfairly and reprehensibly cast his own guilt upon a blameless fellow member of the bar" (50a).

The second set of charges resulting in adverse findings, essentially tracking those on which petitioner had been acquitted by a jury, grew out of another wrongful death case, *Estate of Miriam Krieger v. City of New York*, N.Y. Co. Index No. 8228/80. While central portions of these charges seem graver than those in the *Mowen* case, they may be summarized even more briefly for present purposes.[3]

The case involved a horrible death in an elevator shaft of a City-owned building. It was charged, and the Special Referee found by a preponderance of the evidence, that petitioner, as counsel for the plaintiff decedent's estate, had coached a witness to testify falsely at the trial and to make false statements to opposing counsel. The Referee also found that petitioner had heard one of his witnesses testify falsely at trial and failed to take steps to correct this. Additional findings against petitioner were that he had failed adequately to supervise an investigator and to take remedial action when he should have recognized that the investigator was behaving improperly; that he had engaged in impermissible fee-splitting by arranging to pay an investigator 50% of his usual rate when billed and an additional 100% if the plaintiff succeeded in the case: and that he had paid, or acquiesced in the payment of, excessive fees to witnesses. The findings against petitioner embraced nine counts.

On two additional counts (12 and 15) growing out of the *Krieger* case, the Special Referee found a failure of the

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[3] Again, a fuller account will be found in the Report of the Special Referee (9a-18a).

Disciplinary Committee to prove its charges by a preponderance of the evidence.

It merits at least passing emphasis that the large record reveals, and even the Special Referee's sometimes cursory findings reflect, powerfully disputed issues of fact, on issues that a jury had earlier resolved in petitioner's favor.

The Standard of Proof

The petitioner urged as his first and major ground for his motion to disaffirm the report of the Special Referee that the due process of law requires a standard of proof higher than a preponderance as an evidentiary basis for disbarment. The petitioner called to the attention of the Appellate Division, the court of first instance for such matters, that most of the States, as well as the Federal Courts and Rule 18(C) of the American Bar Association's *Model Rules for Lawyer Disciplinary Enforcement* (1989), call for at least clear and convincing evidence. The argument was given short shrift by the Appellate Division, which ruled, citing *Matter of Capoccia*, 59 N.Y.2d 549 (1983), that New York's Court of Appeals had "conclusively determined that the standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence" (48a).

On petitioner's appeal to the New York Court of Appeals, that Court raised under its procedural rules a threshold question as to whether the constitutional issue of due process warranted its review. Petitioner urged in response that the issue was substantial, and pointed out that the decision in *Matter of Capoccia*, *supra*, had been made on insufficient briefs that failed, *inter alia*, to mention the

heavy weight of contrary authority, the bearing of the Court's decision in *Santosky v. Kramer*, 455 U.S. 745 (1982), and other considerations of consequence. The Court proceeded, nevertheless, to dismiss the appeal on its own motion for want of a substantial constitutional question (55a-56a).

REASONS FOR GRANTING THE WRIT

Two conflicts, with the Fifth Circuit and the Supreme Court of Mississippi, are in themselves considerations favoring review by this Court. But the contrariety of decisions is much broader than that. Arrayed against New York's rule accepting a mere preponderance of the evidence as sufficient for disbarment is the law of 40 States and the federal courts as well as the American Bar Association's Model Rule on the subject. These numbers themselves are persuasive indicia of what due process requires. There are, in addition, inconsistencies, if not square conflicts, with decisions of this Court. This is an occasion, in sum, when the Court's authoritative review on certiorari would give widely valuable guidance on a significant and recurrent question of whether due process requires that attorney disbarment charges be proven by clear and convincing evidence, or whether a mere preponderance of the evidence may suffice to terminate an attorney's professional life.

1. The decision of the Appellate Division holding a preponderance of the evidence sufficient under the due process clause for findings leading to disbarment is in conflict with *In re Medrano*, 956 F.2d 101, 102 (5th Cir. 1992), and *Netterville v. Mississippi State Bar*, 397 So. 2d 878 (Miss. 1981). Both of the latter courts require clear and convincing evidence in order to meet the demands of

due process. The Mississippi Court holds that even to support disciplinary sanctions less severe than disbarment, "clear and convincing evidence . . . is necessary in order to meet the requirements of due process." *Netterville,* 397 So. 2d at 884.

The fundamental divergence on this subject is far wider and more important than is reflected in the explicit rulings of the cited cases. Whether or not they expressly refer to due process, 40 States and the District of Columbia demand a standard higher than a preponderance to sustain an order of disbarment.[4] The usual formulation is "clear

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[4] Alabama: *Jackson v. Alabama State Bar*, 462 So. 2d 365, 369 (Ala. 1985); Arizona: *In re Levine*, 847 P.2d 1093, 1096-97 (Ariz. 1983); California: *Davidson v. State Bar*, 551 P.2d 1211, 1213 (Cal. 1976); Colorado: *People v. Sullivan*, 802 P.2d 1091, 1093 (Colo. 1990); Connecticut: *Statewide Grievance Comm. v. Friedland*, 609 A.2d 645, 647 (Conn. 1992); Delaware: *In re Morford*, 80 A.2d 429, 432 (Del. 1951); District of Columbia: *In re Thompson*, 583 A.2d 1006, 1007 (D.C. 1990); Florida: *Florida Bar v. Ragano*, 403 So. 2d 401 (Fla. 1981); Georgia: *In re Sliz*, 273 S.E.2d 177, 181 (Ga. 1980); Hawaii: *Disciplinary Bd. of Haw. Supreme Court v. Kim*, 583 P.2d 333, 335 (Haw. 1978); Idaho: *In re Jenkins*, 816 P.2d 335, 341 (Idaho 1991); Illinois: *In re Jafree*, 444 N.E.2d 143, 148 (Ill. 1982); Indiana: *In re Sekerez*, 458 N.E.2d 229, 234 (Ind.), *cert. denied*, 469 U.S. 856 (1984); Iowa: *Iowa State Bar Ass'n v. Kraschel*, 148 N.W.2d 621, 625 (Iowa 1967); Kansas: *In re*

(continued...)

[4](...continued)

Matney, 740 P.2d 598, 605-6 (Kan. 1987); Louisiana: *Louisiana State Bar Ass'n v. Mitchell*, 375 So. 2d 1350, 1352 (La. 1979); Maryland: *Attorney Grievance Comm. of Md. v. Kerpelman*, 438 A.2d 501, 506-7 (Md. 1981); Minnesota: *In re Miera*, 426 N.W.2d 850, 853 (Minn. 1988); Mississippi: *Mississippi State Bar v. Young*, 509 So. 2d 210, 213 (Miss. 1987), *petition dismissed*, 523 So. 2d 323 (Miss. 1988); *Attorney W.L. v. Mississippi Bar*, 621 So. 2d 235, 237 (Miss. 1993); Montana: *In re Goldman*, 588 P.2d 964 (Mont. 1978); Nebraska: *State ex rel. Nebraska State Bar Ass'n v. Douglas*, 416 N.W.2d 515, 521 (Neb. 1987), *cert. denied and appeal dismissed*, 488 U.S. 802 (1988); Nevada: *Copren v. State Bar*, 183 P.2d 833, 840 (Nev. 1947); New Hampshire: *Edes' Case*, 395 A.2d 498, 499 (N.H. 1978); New Jersey: *In re Gross*, 341 A.2d 336, 338 (N.J. 1975); New Mexico: *In re Sedillo*, 84 N.M. 10, 498 P.2d 1353 (1972); North Carolina: *In re Palmer*, 252 S.E.2d 784, 789-90 (N.C. 1979); North Dakota: *In re Lovell*, 292 N.W.2d 76, 82 (N.D. 1980); Ohio: Supreme Court Rules for the Government of the Bar, Rule V, § 6(J); *Cincinnati Bar Ass'n. v. Smith*, 67 Ohio St. 3d 71, 616 N.E.2d 190 (1993); Oklahoma: *State ex rel. Oklahoma Bar Ass'n v. Miskovsky*, 824 P.2d 1090, 1098 (Okla. 1991); Oregon: *In re Conduct of Paauwe*, 654 P.2d 1117, 1119 (Or. 1982); Pennsylvania: *Office of Disciplinary Counsel v. Ewing*, 436 A.2d 139, 142-43 (Pa. 1981); *Office of Disciplinary Counsel v.*

(continued...)

and convincing evidence." Georgia requires proof "beyond a reasonable doubt." *Matter of Sliz*, 273 S.E.2d at 181. Idaho calls for a "clear and undoubted preponderance." *Matter of Jenkins*, 816 P.2d at 338. The federal courts, *see In re Medrano*, 956 F.2d at 102, and Rule 18(C) of the American Bar Association's *Model Rules for Lawyer Disciplinary Enforcement* (1989) join in the vast majority demanding "clear and convincing evidence." All distinctly reject the position of New York and a handful of other States accepting a mere preponderance.

The imposing number of American jurisdictions holding the preponderance standard inadequate supply by the weight of their judgments powerful indications of the

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[4](...continued)

Shorall, 592 A.2d 1285, 1286, 1289, 1290, 1291 (Pa. 1991); Rhode Island: *Carter v. Folcarelli*, 402 A.2d 1175, 1177 (R.I. 1979); South Carolina: *In re Friday*, 208 S.E.2d 535, 537 (S.C. 1974); South Dakota: *In re Disbarment of Jaquith*, 117 N.W.2d 97, 98 (S.D. 1962); Utah: *In re McCullough*, 95 P.2d 13, 14, 17 (Utah 1939); Vermont: *In re Wright*, 310 A.2d 1, 9-10 (Vt. 1973); Virginia: *Seventh Dist. Comm. of Va. State Bar v. Gunter*, 183 S.E.2d 713, 717 (Va. 1971); Washington: *In re Little*, 244 P.2d 255, 259-60 (Wash. 1952); West Virginia: *Committee on Legal Ethics of W. Va. State Bar v. Smith*, 399 S.E.2d 36, 39-40 (W. Va. 1990); Wisconsin: *In re Sedor*, 245 N.W.2d 895, 899 (Wis. 1976); Wyoming: *Meyer v. Norman*, 780 P.2d 283, 291 (Wyo. 1989).

process that should be deemed to be due. In *Rivera v. Minnich*, 483 U.S. 574, 578 (1987), this Court pointed out

> that a principal reason for any constitutionally mandated departure from the preponderance standard has been the adoption of a more exacting burden of proof by the majority of jurisdictions. In each of the three cases in which we have held that a standard of proof prescribed by a state legislature was unconstitutional, our judgment was consistent with the standard imposed by most jurisdictions.

2. New York's cursory opinion finding a preponderance sufficient for professional discipline, *Matter of Capoccia*, 59 N.Y.2d 549 (1983), reaffirmed now without further consideration, is at odds with a number of pertinent principles found in this Court's decisions. There was no semblance of the analysis called for by *Santosky v. Kramer*, 455 U.S. 745 (1982), which had reversed New York's preponderance standard for terminating parental rights and was not noticed by the New York Court of Appeals a year later in *Capoccia*. There was at best a superficial glance at *Addington v. Texas*, 441 U.S. 418 (1979), which called for a searching analysis rather than a passing distinction between civil commitment and disbarment. *See* 59 N.Y.2d at 553.

Upon even a curtailed look at *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and *Santosky* 455 U.S. 745, it is

patent that the New York Court, in accepting a preponderance, has not begun to examine the three factors that need to be balanced before reaching such a conclusion:

> the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.

Santosky at 754. When that examination is made, we submit, the New York minority rule on the standard for disbarment becomes unacceptable.

The rule is unacceptable, first, because disbarment is a deprivation "more substantial than mere loss of money", carrying with it "stigma", involving allegations of "fraud or some other quasi-criminal wrongdoing" and bearing "many of the indicia of a criminal trial." *Addington*, 441 U.S. at 424, 425, 426. Disbarment "is a punishment or penalty imposed on the lawyer" following from "adversary proceedings of a quasi-criminal nature." *In re Ruffalo*, 390 U.S. 544, 550, 551 (1968). The interest at stake where loss of a profession or occupation is threatened need not be labored. As the Seventh Circuit said in *In re Fisher*, 179 F.2d 361, 370, *cert. denied*, 340 U.S. 825 (1950), quoting the sound observations of an Illinois appellate court:

> The disbarment of an attorney is the destruction of his professional life, his character, and his livelihood. . . . The court should, therefore, disbar in moderation.

This is, of course, no special or unique thought for lawyers. The courts have frequently recognized with

respect to other kinds of occupation that, one's work being a vital core of one's life, divestiture of other professional or occupational licenses requires a standard of proof higher than a preponderance. *E.g.*, *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987) (secondary school teacher); *Hogan v. Mississippi Bd. of Nursing*, 457 So. 2d 931 (Miss. 1984) (nurse); *Davis v. Wright*, 243 Neb. 931, 503 N.W.2d 814 (1993) (physician).

Moving to the second of the factors, the appraisal of the "risk of error," there is powerful basis for the argument, merely adumbrated here, that the public interest, on a fair balance, is not slighted by the overwhelming majority perception that the State ought to assume more than the minimal risk of error entailed by the preponderance standard before it strips lawyers or members of other occupations of the right to continue in the work of their lives. Like the proceeding in *Santosky*, a disbarment proceeding "bears many of the indicia of a criminal trial." 455 U.S. at 762. Here, as there, the State, unlike a private party, deploys massive resources against the individual - highlighted in this case by the unsuccessful criminal prosecution of petitioner that preceded the disbarment proceeding. *See id.* at 763-64. As the decision in *Santosky* also makes clear, the choice is not a simple one between a virtuous State and an allegedly unfit defendant. Even apart from the impact upon other people and interests, disbarment proceedings fall within the class of drastic threats and deprivations by the State calling for a standard above a preponderance.

Finally, the third factor, "the countervailing governmental interest supporting use of the challenged procedure," is at least as strong here as it was in *Santosky* against New York's preference for a preponderance.

Compared with the 35 States in *Santosky*, there are 40 here evidencing that "a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State." 455 U.S. at 767. It is true here, as it was in *Rivera*, 483 U.S. at 581, that

> [b]ecause the State has superior resources, . . . and because an adverse ruling in a . . . termination proceeding has especially severe consequences for the individuals affected, it is appropriate for society to impose upon itself a disproportionate share of the risk of error in such proceedings.

The New York Court of Appeals, in the cursory paragraph on this subject in *Capoccia*, 59 N.Y.2d at 552-53, never since elaborated or revisited, has never looked at this question for judgment.

Other departures in *Capoccia* from principles laid down by this Court may be noted briefly. The New York Court of Appeals said a preponderance was enough because the license to practice law was a "privilege, . . . more nearly to be classified as a property interest" than a "liberty" interest. 59 N.Y.2d at 553. In this the New York Court was twice wrong. The right to engage in a lawful occupation, a central aspect of a person's life, has long been recognized as a basic "liberty" protected by the Fourteenth Amendment. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976). Further, this Court "has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972). Far more meaningful, and

neglected by the New York Court of Appeals, is the gravity of the proceeding and the deprivation the State seeks to effect, namely, the "quasi-criminal" quality of the disciplinary process and the "punishment or penalty imposed on the lawyer." *In re Ruffalo*, 390 U.S. at 550, 551.

3. In *Santosky v. Kramer*, reversing the New York Court of Appeals holding that a preponderance satisfied due process in parental rights termination proceedings, this Court noted the incongruous New York rules requiring "at least clear and convincing evidence in proceedings of far less moment." 455 U.S. at 767. Examples cited were the requirement of "clear and convincing evidence" for traffic infractions and "clear, positive and convincing evidence" for contract reformation. *Id.* The instances could have been multiplied. To add only two, New York demands "clear and convincing proof" to show a restrictive covenant affecting real property, *Huggins v. Castle Estates, Inc.*, 36 N.Y.2d, 427, 430 (1975), and "clear and convincing evidence" to establish that a decedent made a valid inter vivos gift, *Matter of Love*, 46 N.Y.2d 784, 784 (1978).

But there is a far more striking anomaly, vividly illustrated by this case and affecting disbarment proceedings quite generally. Like all or most States, New York demands "clear and convincing evidence" to prove fraud against anyone, no matter how villainous and no matter how purely monetary and relatively trivial the case may be. *Simcuski v. Saeli*, 44 N.Y.2d 442, 452 (1978). *See* also *Addington*, 441 U.S. at 424. In the present case, the petitioner has been found guilty by a mere preponderance of the evidence of fraud and subornation of perjury in disbarment proceedings terminating his professional life and

stigmatizing his reputation, having previously been tried and acquitted on criminal charges for the same alleged misconduct.

Under the law of New York, a lawyer, like a non-lawyer, sued for $500 for fraud, cannot be held liable without clear and convincing evidence. But the lawyer may be disbarred, and his career destroyed, on no more than a preponderance of the evidence. The self-contradiction points up dramatically the failure of the New York court to make the kind of rational analysis of the affected interests required by *Addington* and *Santosky*. Requiring clear and convincing evidence of fraud to recover a dollar's damages but allowing total termination of a professional career by disbarment on a mere preponderance of evidence of fraud displays the kind of unconsidered incongruity that is the antithesis of principles of due process at least as old as the Magna Carta - principles of "fundamental fairness . . . and . . . rationality that is an essential component of that fairness." *Schad v. Arizona*, 111 S. Ct. 2491, 2500 (1991).

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 13, 1994

DEPARTMENT DISCIPLINARY
COMMITTEE OF THE
SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION:
FIRST DEPARTMENT

----------X

In the Matter of
Theodore H. Friedman,

Respondent.

Docket No. HP17/90
Before the Hon.
Donald J. Sullivan,
Special Referee to
the Departmental
Disciplinary
Committee

----------X

The undersigned was appointed on the 4th day of June, 1990, by the Appellate Division, First Judicial Department, to serve as Special Referee on behalf of the Departmental Disciplinary Committee (Committee) with respect to charges of professional misconduct made against the respondent. The statement of charges is based on the conduct of the respondent in his representation in matters known as: 1) *Mowen v. Wangming Marine Transport Corp.*, 78 Civ. 5537; 2) *Estate of Miriam Krieger v. City of New York*, Supreme Court, New York County (Index No. 8228/80); and 3) *Hill v. Soley*, Supreme Court, Bronx County (Index No. 18762/80). The statement of charges contained 23 separate and distinct charges relating to allegations of misconduct growing out of the above-mentioned matters. Formal proceedings were commenced by notice of charges dated July 20, 1990 and the respondent submitted "Answer to Charges" dated September

17, 1990. Hearings were commenced before me on the 26th day of July, 1990 and Post Hearing Proposed Findings of Fact and Memorandum were submitted by the Committee on May 18, 1992 and by the respondent on August 17, 1992.

JURISDICTION

The respondent Theodore H. Friedman admitted that he was an attorney and counselor at law in the State of New York, having been admitted on April 1, 1957 at a Term of the Appellate Division of the Supreme Court, First Judicial Department. He further admitted that at all times referred to in the subject charges, he maintained offices for the practice of law within the First Judicial Department.

MOWEN v. WANGMING MARINE TRANSPORT CORP.

Charges 1-6

Respondent represented the plaintiff Lorraine Mowen in a wrongful death action arising out of a collision on May 20, 1978 of the cargo ship "Ming Giant" and the tug boat "Ocean King." In the subject collision, Lorraine Mowen's husband, Dennis Mowen, lost his life. The respondent was assisted in this matter by his then partner, Jethro M. Eisenstein and by Frederick J. Cuccia of the firm of Cuccia and Oster. The trial took place before the Hon. Pierre N. Leval of the United States District Court for the Southern District of New York in late 1981 and early 1982. During the trial, the respondent called a Dr. Conrad Berenson as an expert to testify on the question of damages. A product of Dr. Berenson's testimony was marked for identification, namely PX-337(B). Judge Leval eventually ruled that PX-337(B) was not admitted in evidence, but that the respondent could use it argumentatively in his summation. After the jury

commenced their deliberation a note was received requesting the trial exhibits. The trial court instructed the exhibits in evidence be collected and delivered to the jury and repeated the admonition re Exhibit 337(B) which was used in summation but was not in evidence in chief. Thereafter, the jury returned a verdict in favor of the plaintiff and shortly after the announcement of the jury's verdict, Judge Leval's law clerk, Mark Drooks, inspected the contents of the jury room and found PX-337(B), a fact which the court immediately advised counsel. The court advised counsel to file post-trial motions addressing the significance of this discovery on the jury's verdict. The respondent thereafter submitted an affidavit, sworn to March 8, 1982, which placed sole responsibility for sending PX-337(B) to the jury room on his co-counsel, namely Mr. Cuccia. The respondent made no effort to communicate with Mr. Cuccia before submitting this affidavit, and no affidavit was submitted by Mr. Cuccia, who was abroad from March 7 to March 17, 1982. By order dated July 1, 1982, Judge Leval set July 16 for a hearing on defendant's post-verdict motion. The order stated: "Evidence will be taken on the question of the exhibits sent into the jury room." At a hearing which was not held until July 20, 1982, Judge Leval took testimony under oath from all counsel, Courtroom Deputy Patrick Bowes; and his law clerk Mark Drooks. Following the submission of post-hearing briefs, the post-verdict motion was sub judice until December 3, 1982, when Judge Leval rendered an opinion directing a remittitur of the jury verdict. In his opinion, Judge Leval found respondent to have engaged in the "willful misconduct of . . . tampering with the evidence transmitted to the deliberating jury." Judge Leval stated that respondent had "surreptitiously includ[ed] among the exhibits to be sent to the jury an exhibit marked for identification that he well knew had not been received in evidence." Judge Leval concluded that when the jurors were deliberating and asked for all evidence in the

case, respondent caused the exhibit to be sent to them "intentionally and with full awareness that it was in violation of the court's order and rulings as to the receipt of the exhibit." Judge Leval rendered an opinion that the respondent had lied during the hearing by claiming that he had left the courtroom for lunch and had entrusted his co-counsel, Mr. Cuccia, to handle the exhibits that were sent to the jury. Judge Leval thereafter issued a letter of complaint both to the Committee and to the Federal Disciplinary authorities. Pursuant to that complaint, four separate charges were filed against respondent in a Federal Disciplinary Proceeding. The first alleged that respondent had knowingly prepared and sworn a false affidavit blaming his co-counsel, Mr. Cuccia, for placing the controversial exhibit in the jury room. The second charge alleged that he had prepared and sworn a false affidavit blaming Mr. Cuccia without personal knowledge or factual basis. The third charge alleged that he had knowingly given false testimony that he was absent from the courtroom when the exhibits were marshalled and delivered to the jury. The fourth charge alleged that he had knowingly delivered the unreceived exhibit into the jury room. Thereafter, the respondent admitted the second charge in exchange for dismissal of all other charges at a disciplinary hearing on January 9, 1985. On November 4, 1985, the Committee on Grievances of the Southern District recommended a sanction that a formal letter of reprimand be issued to respondent and that this letter be made a matter of public record. A subsequent letter of censure was written and distributed by Judge Vincent L. Broderick, Chairman of the Committee on Grievances on June 23, 1986.

Count No. 1

The essential elements of Count No. 1 are that Mr. Friedman intentionally caused to be placed in the jury room

during deliberations an exhibit (PX-337B) when he knew that same had not been received in evidence, and the placing of said exhibit was done with full awareness that it was in violation of the Court's order and ruling as to the receipt of the exhibit in evidence. It is conceded by the Committee that there is no direct testimony establishing that the respondent was responsible for placing the unreceived exhibit in the jury room. The Committee seeks to establish the essential elements of the Count No. 1 based on circumstantial evidence, that is, the importance of the subject exhibit, opportunity to place said unauthorized exhibit in the jury room and a strong desire to retrieve same following the verdict. Viewing all the evidence under a "fair preponderance" standard, I find that the Committee has failed to establish that the respondent, Theodore Friedman, intentionally sent exhibit 337(B) to the jury room.

Count No. 2

The essential elements of this Count, that is, the making of false statements without personal knowledge or factual basis, are based on an affidavit that was submitted in response to a post-verdict motion pending before Judge Leval, U.S.D.C., Southern District (*Mowen v. Yangming Marine Transport Corp.*, 78 Civ. 5537 [PNL]). The gravamen of paragraph 38 (Notice of Charges) was that Mr. Friedman swore to facts "about which he had no personal knowledge or factual basis, direct or indirect . . ." The essential elements of Count No. 2, except for slight modification, is word for word identical to the second charge issued by the Federal Grievance Committee to which respondent admitted and for which he was sanctioned. I find that the respondent's conduct violated DR1-102(A)(5), DR1-102(A)(6) and DR7-106(C)(1).

Count No. 3

Count No. 3 charges the respondent with an act of professional misconduct in the preparation and swearing through an affidavit which contained false statements without undertaking an effort to verify them and accordingly, the respondent acted with reckless disregard for the truth in violations of DR1-102(A)(5) and DR1-102(A)(6). The charge alleges that the false statements were made recklessly. I find that it has been established by a preponderance of evidence that the subject false statements were made without any effort to verify them. The respondent expressly admitted the second federal charge stating that "he had no personal knowledge or factual basis, direct or indirect." Said admissions were made to the federal charges brought on before the Committee on Grievances of the Board of Judges of the Southern District of New York, and also before a Grand Jury, that his affidavit, as it referred to Mr. Cuccia, were false. An attorney's submission of an affidavit blaming his co-counsel for so serious an act and purporting to describe his co-counsel's subjective state of mind without making any effort to confirm the truth with co-counsel, is certainly reckless in the circumstances. I find that the respondent's conduct violated DR1-102(A)(5), DR1-102(A)(B) and DR7-106(C))(l).

Count No. 4

Said Count charges the respondent with the making of an affidavit which was submitted to Judge Pierre Leval in the United States District Court for the Southern District of New York containing statements which were false and that the respondent knew that said statements were false. The record indicates that respondent had conversations with Mr. Cuccia which clearly indicate that exhibit 337(B) was not in evidence. Therefore, it could not have been indicated that Mr. Cuccia

did this in good faith as set forth in the affidavit. Far from the false statements about Cuccia, the respondent's affidavit contains numerous other false or misleading statements of material fact about the exhibit marshalling process. The respondent's statement that Cuccia handled the marshalling of the exhibits for the plaintiff was contradicted by others present in the courtroom who indicated that the respondent was involved in the process of marshalling the exhibits. Also contradicted by testimony was the respondent's statements that all the exhibits going to the jury were made available to counsel and that defense counsel had access and opportunity to examine them before the Clerk moved them into the jury room. The respondent also indicated that the Clerk checked with all counsel as to whether the plaintiff's exhibits had been reviewed and that all counsel assented before the same were moved into the jury room, and said statement was contradicted by the Clerk of the Court who indicated that he relied completely on the respondent in reference to the checking of the exhibits. It should be further noted that the respondent's sworn statements in his affidavit about what transpired during the period when the exhibits were being collected, is not in conformance with his position that he was not present when these events were occurring. Accordingly, if he was not present he could not have filed the affidavit based on personal knowledge. Accordingly, I find that the statements set forth in the subject affidavit were statements made by the respondent knowing that said statements were false, and accordingly, the respondent violated DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(5), DR7-102(A)(6) and DR7-102(A)(8).

Count No. 5

The essential elements of this Count charge Mr. Friedman of intentionally making a false and misleading

statement while testifying at the July 20, 1982 hearing before Judge Leval concerning his presence in the Courtroom during the entire marshalling process. It is the position of Mr. Friedman that said testimony was somewhat inaccurate but not intentional and thus, not sufficient to establish an ethical violation. Mr. Friedman's testimony was contradicted by the trial transcript, which placed the respondent in the Courtroom throughout the period which the exhibits were being marshalled. It is the position of the respondent that he considered the issues so relatively insignificant that he neglected to review the trial transcript; that said position must be reviewed in the context that the purpose of the hearing set down by Judge Leval was to take evidence on the subject of the unauthorized exhibit in the jury room. I find that the respondent's conduct violated DR1-102(A)(5), DR1-102(A)(4), DR7-102(A)(6), DR7-102(A)(5), DR1-702(A)(6) and DR1-702(A)(8).

Count No. 6

This count charges the respondent with professional misconduct for failing to advise the Court of inaccuracies in his affidavit, once having been informed through Mr. Cuccia that portions of the affidavit was inaccurate. The record clearly indicates that Mr. Cuccia returned from Europe on or about March 17, 1982 and when made aware of the contents of the affidavit submitted by the respondent to Judge Leval challenged the contents of the affidavit. Further, the record indicates that at no point prior to, during or subsequent to Judge Leval's hearing, did the respondent take any steps to inform Judge Leval of Mr. Cuccia's position re the contents of the affidavit. It is clear that the respondent admitted the conversations with Cuccia prior to exhibit marshalling, in which it was acknowledged by Cuccia that Exhibit 337(B) was not to go to the jury room and accordingly, that said

statement flies in the face of the allegation set forth by the respondent in the affidavit wherein it is alleged that Mr. Cuccia acted in "good faith." It is the position of the respondent that DR1-102(A)(4), that is, prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation within the context of the subject facts, is not violative of this Section in that it does not rise to the level of morally abhorrent behavior. I find that the respondent knew or should have known of the inaccuracies of the allegations as he set forth in the affidavit which was to be presented to Judge Leval and in failing to rectify the record, he violated DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(3) and DR7-102(A)(6).

ESTATE OF MIRIAM KRIEGER v. CITY OF NEW YORK

Charges 7 - 17

The respondent represented Miriam Krieger and the Estate of Aaron Krieger in a civil negligence lawsuit filed in Supreme Court, New York County. The plaintiff sought monetary damages for the death of Aaron Krieger, who fell down an elevator shaft at 291 Bowery Avenue on April 4, 1979. Named as defendants in the case were the City of New York (City) which owned the building and Universal Elevator Company (Universal) which had been retained by the City to maintain the repair of the elevator. Stanton Trading Corporation (Stanton), a tenant of the building, and Aaron Krieger's employer at the time of his fatal fall, was impleaded as a third-party defendant. A central issue in the plaintiff's claim against the City was whether the safety devices on the elevator were working properly at the time of Aaron Krieger's death. To establish its defense, the City, represented by Laura Shapiro of the Corporation Counsel's Office, intended

to call Michael Cohen, a Stanton employee at the time of the accident, to testify about the manner in which Stanton employees operated the elevator. During the course of the trial, Cohen met with Shapiro.

The respondent retained Mr. Elliott Goldman, a private investigator, to investigate the accident and prepare witnesses for trial. The respondent performed no background investigation of Mr. Goldman prior to retaining him. Mr. Goldman was given authority to compensate witnesses without prior approval from respondent or anyone in respondent's office, nor did he give Mr. Goldman guidelines to follow with respect to the interviewing of witnesses and the taking of statements. Under the terms of the agreement with the respondent, Mr. Goldman was promised 50% of Goldman's hourly rate on billing and an additional 100% of this rate on accumulated hours if the case was successful. The charges allege that as the result of the actions of Elliott Goldman and the failure of the respondent to properly supervise, Mr. Goldman interviewed and obtained statements which were in fact fabrications of the facts. The charges further indicate that the respondent met with Michael Cohen, one of the witnesses who had been contacted by Mr. Elliott Goldman, prepping him as to how to handle the examination and/or cross-examination of the City's counsel. The respondent's law firm reimbursed Mr. Goldman for each of the payments he made to the witnesses. One of the witnesses, namely Arthur Eilets, who had been contacted by Mr. Goldman, during Ms. Shapiro's recross examination of Mr. Eilets, gave false answers in response to several questions touching on his bias and credibility as a witness. The respondent never revealed Mr. Eilets' false statements to the court or parties although the respondent knew same to be false. In February of 1986, Mr. Goldman was indicted for bribery of a witness based on his November 21, 1985 meeting with Michael

Cohen. The respondent was furnished with a copy of a tape in reference to the meeting by Goldman and Mr. Cohen. Despite listening to the tape, the respondent continued to use Mr. Goldman's services on the *Krieger* case and other cases at least up until sometime in 1987.

Count No. 7

The thrust of this Count is that on December 16, 1985, the respondent solicited and requested Michael Cohen, a prospective witness for the City in the *Krieger* case, to give false testimony at trial that his only meeting with respondent consisted entirely of the discussion as to whether he, Michael Cohen, was required to meet with the Assistant Corporation Counsel. After a reading of the tape and the surrounding circumstances, it is clear to this Referee that the respondent was preparing Mr. Michael Cohen to give false testimony at the *Krieger* civil trial. The meeting met the test of coaching and instructing Mr. Cohen as to what to say on the witness stand, and further, offering Mr. Cohen a theory to reconcile any conflicting statements that he may have given. It is the respondent's position that he sought to have Mr. Cohen give disinformation to his adversary, not commit perjury while testifying. I find that the respondent violated DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(4), DR7-102(A)(6) and DR7-102(A)(8).

Count No. 8

The respondent is charged with soliciting or requesting Michael Cohen, a prospective witness for the City of New York in the *Krieger* case, to give false testimony at trial that no one had paid or had offered to pay Michael Cohen money in connection with his prospective appearance as a witness. The record clearly indicates that in fact the respondent knew

that an investigator, namely Elliot Goldman, had paid and had offered to pay Michael Cohen money in connection with his prospective appearance as a witness. The defense to this charge is again that the respondent sought to have Cohen give disinformation to his adversary. The respondent violated DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(4), DR7-102(A)(6) and DR7-102(A)(8).

Count No. 9

The respondent is charged with requesting Michael Cohen, a prospective witness for the City of New York in the *Krieger* case, to make false statements to opposing counsel, Laura Shapiro of the Corporation Counsel's office, that Cohen's only meeting with respondent consisted entirely of a discussion as to whether he, Michael Cohen, was required to meet with the Assistant Corporation Counsel. The position of the respondent is that same was a disinformation ploy which was not malicious nor was there any premeditation, but same was to increase the likelihood that Mr. Cohen would be called by the City through Laura Shapiro, the Corporation Counsel. It is clear that a direct misrepresentation of material fact to opposing counsel made at the direction of Mr. Friedman with the intent to induce reliance thereon is unethical professional conduct. Said conduct constituted a violation of DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(3) and DR7-109(A).

Count No. 10

Said count indicates that Mr. Friedman solicited and requested Michael Cohen to make false statements to opposing counsel, Laura Shapiro of the corporation counsel's office, that no one had paid or had offered to pay Michael Cohen money in connection with his prospective appearance as a

witness. This Count is similar to No. 9 in that the thrust is soliciting a prospective witness to lie to the respondent's opposing counsel, Laura Shapiro of the corporation counsel's office. The respondent's position that same was not malicious nor that was there any premeditation, and further the intent was to increase the likelihood that Mr. Cohen would be called as a substantive truthful witness by the opposition. As indicated in Count No. 9, sound considerations of policy clearly establish that a direct misrepresentation of material fact to opposing counsel made at the direction of a lawyer in the course of litigation and with the intent to induce reliance thereon is unethical professional conduct. The respondent violated DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(3) and DR7-109(A).

Count No. 11

The respondent is charged with soliciting and requesting Michael Cohen, a prospective witness for the City in the *Krieger* case, to give false testimony that he had been and recalled being present when Wilhemina Oliver, a Manager for the City of New York, was told of dangerous conditions concerning the elevator which was the site of the accident and that she promised to have those conditions corrected. Although the evidence submitted in reference to this charge is at times contradictory, the credible evidence establishes that the respondent asked Mr. Cohen to testify falsely about Wilhemina Oliver, or, at the least, that respondent ask Mr. Cohen to say things which Cohen did not know or believe to be true. I find that the respondent violated DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(4), DR7-102(A)(6) and DR7-102(A)(8).

Count No. 12

The respondent is charged with soliciting and requesting Arthur Eilets, a witness for the plaintiff, to give false testimony. There is no direct evidence that the respondent solicited and requested Arthur Eilets, a witness for the plaintiff in the *Krieger* case, to give false testimony as set forth in the subject Count. There is substantial circumstantial evidence, that is, conversations between Cohen and Eilets, and Goldman and Eilets -- the foundation the special counsel seeks to build his inferences that the respondent solicited and requested the false statements as set forth in the subject charge. I find that a committee has failed to establish by a preponderance of evidence the essential elements of Count No. 12 re that the respondent solicited and requested the subject false testimony.

Count No. 13

The respondent is charged with professional misconduct in that having been present when a witness for the plaintiff, Arthur Eilets, gave material false testimony, which the respondent knew same to be false and he took no steps to reveal the fraud to the Court or the parties. Both the Committee and the respondent produced experts in the field of ethics, Professor Wolfram, who testified on behalf of the Committee, and Professor Hazard on behalf of the respondent. The respondent further produced two distinguished members of the Bar, that is, Robert Conasan, Esq. and Thomas Moore, Esq. The ethical rule most directly applicable to the charge is DR7-102(B)(2). The testimony of Messrs. Conasan and Moore was offered so that the conduct of Mr. Friedman could be evaluated in terms of what the legal community reasonably believed was reasonable and ethical that is a view from the well. It is the position of the

respondent that his duty was excused in this case because Eilets' false testimony went to collateral matters and because it was elicited on cross-examination, as opposed to direct examination, and therefore argues that the false testimony was not a fraud upon the Tribunal within the meaning of the rule. As indicated, the Committee agrees that it is appropriate to read some concept of materiality into DR7-102(B)(2), but it is the position of the Committee that the Eilets' testimony was pivotal to the respondent's case. The respondent subjectively evaluated the testimony as "collateral" and made a "judgment call" and failed to reveal the Eilets' false testimony. The respondent's position is he exercised his judgment in favor of his client. The respondent opines that credibility of a witness is not always collateral but it was collateral in reference to Eilets' testimony. The respondent arrived at said conclusion in spite of the fact that Eilets was on the stand for four days, that he was prepared for said testimony by the respondent, and that he was paid $1,900.00 plus a suit and transportation. I find that the Committee established that Mr. Eilets gave material false testimony which the respondent knew to be false and took no steps to reveal said facts to the Court or parties and accordingly violated DR7-102(B)(2).

Count No. 14

The respondent is charged with committing acts of professional misconduct in failing to supervise and give appropriate instructions to an investigator, namely Elliott Goldman, who had been hired by the respondent in reference to, among other cases, the *Krieger* case. Count No. 14 further charges the respondent with failing to take reasonable remedial action after it became apparent that Mr. Goldman was engaged in unethical and illegal behavior. The record indicates that Mr. Friedman was exposed to Mr. Goldman in approximately 1979 when he was a partner in the firm of

Schneider, Kleinick, Friedman, Arum & Katz. Mr. Elliott Goldman was one of a number of private investigators used by the "Schneider" firm who had substantial experience as a trial prep man. The record further indicates that the respondent continued to use Mr. Goldman's services in other cases after the respondent left the "Schneider" firm and formed the firm of Friedman, Ennis & Isenstein. The record clearly indicates that the respondent did not conduct any background investigation, nor did he set down any parameters or give any direction to Mr. Goldman in the performance of his duties as a private investigator. These actions or failure to act by the respondent was premised on the basis that Mr. Goldman was an experienced prep man who did not need instruction on interviewing witnesses or taking statements. But there came a time when the respondent should have been alerted that Mr. Goldman was engaged in questionable activities, in particular, the backdating of a statement that had been obtained by Mr. Goldman from a Mr. Henry Richardson and after being made aware of the contents of a tape of 11/21/85 re a meeting with Mr. Goldman and a Mr. Cohen. Said facts triggered an affirmative duty on the part of the respondent to investigate and review Mr. Goldman's tactics in obtaining witnesses' statements. When language which was utilized by Mr. Goldman such as "sign anything," and language such as "pay me for my testimony," a statement made by Mr. Cohen to the respondent allegedly made by Mr. Goldman, and the fact that after February 1986 Mr. Goldman was indicted for bribery of a witness based on the 11/21/85 meeting with Mr. Michael Cohen, all of said statements and/or actions triggered an affirmative duty on the part of the respondent to take reasonable remedial action to reign in and control Mr. Goldman as a private investigator. Accordingly, I find that the respondent violated DR1-102(A)(5).

Count No. 15

The subject Count charges the respondent with committing acts of professional misconduct in that he acquiesced in the payment of compensation to a witness in the *Krieger* case, namely one Arthur Eilets, contingent on the contents of Eilets' testimony. The record indicates that Mr. Eilets, who was retired at the time of the trial, received approximately $1,900.00 and additional compensation for expenses during the trial such as a new suit and transportation to and from the Courthouse. It is clear that the amount of payment to a witness should not be so high as to induce the witness to testify falsely and further, that such questions ultimately become matters of judgment. The record does indicated that Mr. Eilets testified four days during the course of the *Krieger* trial. I find that on its face, the amount of compensation paid to Mr. Eilets appears to be generous, but I fail to find that the record substantiates the position of the charge that the payments were contingent on the contents of Eilets' testimony. Accordingly, I find Count No. 15 not proven.

Count No. 16

The respondent is charged with entering into a contingency fee arrangement with Elliott Goldman, a non-lawyer, under which respondent agreed to pay Goldman 50% of Goldman's hourly rate on billing and an additional 100% of this rate if the case was successful. The respondent admitted in Grand Jury testimony that he had an agreement with Elliott Goldman where Mr. Goldman would receive additional monies over and above his hourly compensation, and that same was contingent on the success of the litigation. It is the position of the respondent that Mr. Goldman was not receiving a percentage of Mr. Friedman's fee, or a percentage of the firm's profit, and further that DR3-102 was enacted to

prohibit the payment to a non-lawyer based on a percentage of the recovery in a case. The respondent's position that it is not fee splitting since it is not paid out of the net fee of Mr. Friedman, the respondent. I find that it is clear that the respondent-Goldman's fee arrangement was contingent on the outcome of the *Krieger* case. The agreement making Mr. Goldman's remuneration contingent on winning the *Krieger* case, created an incentive for Mr. Goldman to make that outcome eventually beneficial to him and created the incentive to influence the testimony of a witness. I find that the interpretation of the respondent would frustrate the primary purposes of DR3-102. I find that the respondent violated § DR3-102 which prohibits fee splitting with a non-lawyer.

Count No. 17

The respondent is charged with acts of professional misconduct in that he offered and paid, and acquiesced in the payment of, unreasonable and excessive sums of money and other benefits to witnesses and prospective witnesses, in particular, fees to Joseph Ferranti, an elevator inspector employed by the New York City Department of Buildings, and payments to Mordechai Margolese, a co-worker of Aron Krieger and Mr. Eilets. Within the contents of the record, I find that the Committee has established that the payments to the aforementioned individuals were unreasonable and excessive within the purview of DR7-109(C)(1). Accordingly, I find the respondent violated DR7-109(C)(1).

HILL V. SOLEY, Supreme Court, Bronx County

Charges 18 - 23

The litigation grew out of vehicular accident occurring in the Bronx, New York on July 11, 1982. The accident involved a motorcycle driven by the plaintiff, Brian Hill (Hill), and an automobile driven by the defendant, Oswald Soley (Soley), resulting in injuries to Hill's left leg and foot. The plaintiff, Hill, alleged that his injuries which grew out of the vehicular accident, were compounded by the post-accident treatment he received at Montefiore Hospital (Montefiore), the defendant, in a second cause of action instituted by Hill. On February 8, 1988, during a recess in jury selection, a discussion took place between the respondent and a Robert Philips, Esq., attorney for Soley. It was the position of Mr. Philips that he understood that the discussion involved perjury by Soley about the cause of the underlying accident or at the very least, it was intended by respondent, and understood by Philips, that Soley would not appear at the trial to contradict the testimony of Hill, and that Soley would adopt a trial strategy designed to enhance Hill's likelihood of recovery against Montefiore. On February 9, 1988 in a recorded colloquy involving Mr. Philips, Justice Florio and Mr. Adelman (counsel for Montefiore), Mr. Philips revealed respondent's proposal to the court. When first confronted with the matter, respondent flatly denied that any such discussion had taken place between Philips and himself on the subject of respondent's proposal. But after the court reporter arrived, the respondent acknowledged some conversation had taken place. It was the position of the respondent that the conversation between himself and Mr. Philips related purely to trial strategy and that he never proposed any deal to Mr. Philips, let alone one involving a change in testimony by Soley. Thereafter, Justice Florio disbanded the jury and

recused herself from the case. During the course of the retrial of the case which took place in late 1989, respondent offered the testimony of an orthopedist named Dr. John Nailor. Dr. Nailor testified on direct examination, that he was a diplomat in the American Board of Orthopedic Surgeons. Thereafter, evidence was introduced to indicate that Dr. Nailor was not certified by the American Board of Orthopedic Surgeons. Respondent's explanation consisted of a letter dated January 4, 1990 from a Dr. Rask of the American Academy of Neurological and Orthopedic Surgeons verifying that Nailor was board certified by that organization, an organization which is not recognized by either the American Medical Association or the American Academy of Medical Specialties.

Count No. 18

The respondent is charged with committing an act of professional misconduct in that he proposed to Robert Phillips, attorney for the defendant Soley, that respondent would guarantee that his client would not executed on a judgment in excess of $10,000 against the Soleys in exchange for an agreement by Soley to modify his testimony at trial to conform to Hill's version of the underlying accident. It is the position of the respondent that he in essence had what he referred to as a trial strategy conference wherein, if Mr. Phillips would agree not to affirmatively call his client as a witness, and otherwise not play an aggressive role at trial, Mr. Friedman would not pursue the Soley family beyond the $10,000 insurance policy limit. It was the subjective evaluation of Mr. Phillips that "Mr. Friedman's proposal would require that the substance of the sworn testimony of Soley would be materially changed . . . ." The record compiled before Justice Florio indicates that although the respondent did not use words to the effect of changing the

testimony, it was Mr. Phillips' subjective conclusion that Mr. Friedman was suggesting that Mr. Soley's rights should not be vigorously put forth in the subject trial. In reviewing the transcripts of the records compiled before Judge Florio and the testimony of Robert Phillips who testified before this body, I find that the Committee has failed to meet their burden of proof to establish that the respondent proposed an arrangement whereby Soley would modify his testimony to conform to Hill's version of the underlying accident. Accordingly, I find Count No. 18 not proven.

Count No. 19

The subject Count alleges that on February 8, 1988 the respondent, acting as attorney for the plaintiff in the *Hill* case, committed an act of professional misconduct in that he proposed to Robert Phillips, the attorney for the defendant Soley, a proposal in secret with the intent of remaining undisclosed to the other parties, namely the Court and the jury, that the respondent would guarantee that his client would not execute on the judgment in excess of $10,000 against the defendants Soleys in exchange for an agreement on the part of the Soleys not to appear at the trial or otherwise mount a liability defense relating to the underlying accident. In essence, the subject Count alleges that Mr. Friedman improperly sought to mislead the jury, enhance the credibility of the plaintiff, Mr. Hill, and conceal his arrangement from the Court and jury. This charge is in the alternative to Count No. 18 wherein it was charged that the respondent solicited false testimony from Soley. The underlying charge is basically premised on what has become known as a "Mary Carter Agreement" (*Booth v. Mary Carter Paint Co.*, 202 S.2d 8 (Fla. App., 1967) which is basically an agreement between an injured plaintiff and one co-tortfeasor placing a limit on the liability of the latter and providing that such sums will be

reduced or extinguished in relation to the recovery against the non-agreeing co-tortfeasor. There is no uniform consensus with respect to "Mary Carter Agreements" concerning their ethical and legal viability. The New York Courts do not appear to have addressed the issue. The agreement which is the subject of this charge does not possess all of the essential elements as envisioned in a "Mary Carter Agreement." It is the position of the Committee that the essential elements of a "Mary Carter Agreement" are not present in the subject factual scenario and accordingly, the respondent's ethical argument as to the "Mary Carter Agreement" is not relevant. It therefore boils down to a very simple question of whether the respondent's proposal presented a straightforward question of whether collusive and deceptive conduct, as in this particular charge, is prescribed by the disciplinary rules. I find that although all of the essential elements of the "Mary Carter Agreement" are not present, the concept was being relied on by the respondent to establish his trial tactics, and based on the acceptability of such an agreement within the Bar, I find that Count No. 19 has not been proven.

Count No. 20

The subject Count charges the respondent, when acting as an attorney for the plaintiff in the *Hill* case, with committing an act of professional misconduct in that having been questioned about the existence and the contents of a conversation between himself and Robert Phillips on February 8, 1988, the respondent denied to the Court that any such conversation had taken place on that day in spite of the fact that he knew said statement was false. The basis of this charge is that the respondent told a different story about his conversation with Mr. Phillips in an unrecorded colloquy than what he set forth on the record before the Judge and the parties. I find that the Committee has failed to establish the

essential elements of the subject charge and accordingly, the Count is not proven.

Count No. 21

This Count, namely Count No. 21, is related to the aforementioned Count No. 20 which is premised on the respondent having knowingly made false and misleading statements to the Court after the court reporter was called in during the "on the record" conference before Judge Florio. I find that the Committee has not established by a preponderance of evidence that the subject trial strategy discussions between the respondent and Mr. Phillips rose to the level that same constituted a violation of the code of professional responsibility, in particular, the sections as highlighted in Count No. 21. Accordingly, I find that said Count is not proven.

Count No. 22

Said Count charges the respondent with committing an act of professional misconduct in that he directed his employees and agents to destroy a portion of the respondent's files relating to the *Hill* case even though at the time, the respondent knew that said case was the subject of disciplinary investigation; that the respondent's counsel had previously accepted a subpoena calling for the entire contents of the subject file, and that the respondent knew that Counsel had accepted service of said subpoena. The respondent does not contest that he ordered the documents destroyed, nor does he contest that he knew that the *Hill* case was under investigation and that he had been served with a subpoena, but in essence alleges that certain office practices were established as to what particular records and/or documents would be disposed of when a case was closed. The respondent further indicates that

all relevant documents relating to the contested issues were in fact, produced to the Committee. The respondent was responsible for compliance with the subject subpoena and cannot abrogate responsibility because he delegated the responsibility to his counsel, but within the totality of the factual pattern of the subject case, I find that the essential elements of Count No. 22 have not been established and accordingly, not proven.

Count No. 23

On November 21, 1989, the respondent, counsel in the *Hill* matter, committed an act of professional misconduct in that he solicited from one Dr. John R. Nailor, an orthopedic expert called to testify by respondent, that he was a diplomat in the American Board of Orthopedic Surgeons, when in fact the respondent knew or should have known that this testimony was false. The record indicates that the subject witness was prepared by an associate of Mr. Friedman, namely Mark Bern, Esq., and he was satisfied that Dr. Nailor possessed the essential certification, that is Board Certification, as a diplomat in the American Board of Orthopedic Surgeons. When Dr. Nailor was asked whether he was "Board Certified," Bern understood the meaning to be certified with the American Board of Orthopedic Surgeons, when in fact Dr. Nailor was certified by the "American Board of Neurological Orthopedic Surgeons." The pivotal section which is paramount in this particular charge is DR7-102(A)(6) which provides that "in the representation of a client, a lawyer shall not . . . participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false." I find that the Committee has failed to establish the essential elements of said section and accordingly, find said charge not proven.

RECOMMENDATIONS

The within matter is respectfully referred to the Court pursuant to Rule 605.15(e) with my recommendation of suspension.

PRIOR ACTIONS

Respondent has received a prior letter of censure from the Committee on Grievance of the Southern District dated June 23, 1986. The letter of censure grows out of a complaint issued by the Hon. Pierre N. Leval of the United States District Court for the Southern District of New York. The charge, that is, preparing and swearing a false affidavit without personal knowledge or factual basis, is a product of the *Mowen v. Wangming Marine Transport Corp.* matter which was also the subject of Count No. 3 of the subject proceedings.

RECOMMENDED SANCTION

The respondent, Theodore H. Friedman, is a native New Yorker who was born and raised in the Bronx. He did undergraduate work in Michigan and thereafter, won a scholarship to Harvard Law School. He graduated from Harvard with distinction and later became a partner in a prestigious Manhattan firm, which is today known as Phillips Nizer. He left Phillips Nizer in the 1960s to form his own firm where he specialized in personal injury cases. From all accounts, the respondent, Theodore H. Friedman, is a lawyer of exceptional abilities and energies who has risen to the top of his profession. He has argued cases before the United States Supreme Court and is considered by his peers to be one of the finest, if not the finest, personal injury trial lawyer in New York. He is one of this City's leading negligence

lawyers with over thirty years experience in the maritime and personal injury field. He is married and the father of two children. (Opening statement by Daniel L. Brockett, Esq., Special Trial Counsel, Department Disciplinary Committee, pps. 16 and 17, July 1, 1991).

The respondent has practiced law for approximately 35 years, having been admitted on April 1, 1957. Other than the three causes of action which have resulted in the subject charges, the respondent, who is an active litigator, conducted his professional life within the parameters of the Code of Professional Responsibility (Code), but in recent years it appears that he has become consumed with the will to win at any price. His success in his specialty seems to have dulled his responsibility to seek justice within the guidelines of the Code. The charges that I have found proven violate the Code and go to the heart of ethical responsibility of a practicing lawyer. In the totality of the respondent's professional life the charges may seem few in number but the seriousness of the proven charges cry out for condemnation. I therefore recommend that the respondent be suspended for a period of two years and before an application for reinstatement be entertained, he participate in a recognized ethics course which should highlight his responsibility to the law and his client.

Dated: White Plains, New York
March 16, 1993

/s/ DONALD J. SULLIVAN
DONALD J. SULLIVAN
Special Referee

SUPREME COURT, APPELLATE DIVISION

First Department, December 1993

Filed March 22, 1994

Francis T. Murphy, Presiding Justice
Joseph P. Sullivan
John Carro
Sidney H. Asch,
Israel Rubin, Justices.

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In the Matter of Theodore H. Friedman,
(admitted as Theodore Herzl Friedman)
an attorney and counselor-at-law:

Departmental Disciplinary Committee
for the First Judicial Department, M-2445
Petitioner,

M-5413

Theodore R. Friedman, Esq.,
Respondent.

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Disciplinary proceedings instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the Bar at a Term of the Appellate Division of the Supreme Court for the First Judicial Department on April 1, 1957.

Kenneth M. Bernstein and Jonathan K.M. Crawford, of counsel (Daniel L. Brockett, Special Trial Counsel, Hal R. Lieberman, attorney) for petitioner

Marvin E. Frankel and Michael S. Ross, of counsel (Kramer, Levin, Naftalis, Nessen, Kamin & Frankel, attorneys) for respondent.

Motion No. 2445
Cross-Motion No. 5413

IN THE MATTER OF THEODORE H. FRIEDMAN, an Attorney

PER CURIAM

Respondent, Theodore H. Friedman was admitted to the practice of law in New York by the First Judicial Department on April 1, 1957 under the name Theodore Herzl Friedman. At all times relevant herein respondent has maintained an office for the practice of law within the First Judicial Department.

Respondent was served with a Notice and Statement of Charges which allege twenty-three separate counts of professional misconduct stretching over a decade and arising out of respondent's representation of personal injury claimants in three separate matters: (1) *Mowen v. Yangming Marine Transport Corp.*, 78 Civ. 5537 (Counts 1-6); (2) *Estate of Miriam Krieger v. City of New York*, Supreme Court, New York County (Index No. 8228/80) (Counts 7-17); and (3) *Hill* v. Soley, Supreme Court, Bronx County (Index No. 18762/82) (Counts 18-23).

Pursuant to 22 N.Y.C.R.R. §§ 603.4(b) and (d), and the Committee Rules, Hon. Donald J. Sullivan was appointed by this Court to serve as Special Referee.

Hearings were held before the Special Referee on twenty-six days commencing on July 1, 1990 and ending on May 22, 1992. The transcript of the proceedings runs over 5,000 pages. Thirty witnesses testified, including two preeminent

ethics experts (one for each side). During the course of the hearings the following facts were adduced and conclusions reached.

Mowen v. Yangming Marine Transport Corp. - Counts One-Six

Respondent represented the plaintiff Lorraine Mowen in a wrongful death action arising out of a ship collision in which her husband, Dennis Mowen, lost his life. The respondent was assisted in this matter by his then partner, Jethro M. Eisenstein and by Frederick J. Cuccia of the firm of Cuccia and Oster. The trial took place before the Hon. Pierre N. Leval of the United States District Court for the Southern District of New York in late 1981 and early 1982. During the trial, a report by an expert called by respondent was marked for identification, as PX-337(B). Judge Leval would not allow PX-337(B) in evidence, but ruled that the respondent could use it argumentatively in his summation. After the jury commenced their deliberation a note was received from them requesting the trial exhibits. The trial court instructed the exhibits in evidence be collected and delivered to the jury and repeated the admonition about Exhibit 337(B) which was used in summation but was not in evidence in chief. Thereafter, the jury returned a verdict in favor of the plaintiff and shortly after the announcement of the jury's verdict, it was discovered that PX-337(B) had been given to the jury. Respondent thereafter submitted an affidavit, sworn to March 8, 1982, in which he placed the entire responsibility for sending PX-337(B) to the jury room on his co-counsel, Mr. Cuccia. Respondent stated that Mr. Cuccia had sent the exhibit into the jury room, in the mistaken belief that it was part of the evidence received. Respondent, however, made no effort to communicate with Mr. Cuccia before submitting this affidavit, casting the blame

on him, and no affidavit was submitted by Mr. Cuccia, who was abroad from March 7 to March 17, 1982 and who knew nothing of respondent's affidavit at that time.

After a hearing, in an opinion dated December 3, 1982, Judge Leval found respondent to have engaged in the "willful misconduct of . . . tampering with the evidence transmitted to the deliberating jury." Judge Leval stated that respondent had "surreptitiously includ[ed] among the exhibits to be sent to the jury an exhibit marked for identification that he well knew had not been received in evidence." Judge Leval concluded than when the jurors were deliberating and asked for all evidence in the case, respondent caused the exhibit to be sent to them "intentionally and with full awareness that it was in violation of the court's order and rulings as to the receipt of the exhibit." Judge Leval rendered an opinion that based upon the transcripts respondent had lied during the hearing claiming that he had left the courtroom for lunch and had entrusted his co-counsel, Mr. Cuccia, to handle the exhibits that were sent to the jury. (*Red Star Towing & Transp. Co. v. "Ming Giant"*, 552 F. Supp 367 at 382-386 [1982]).

Pursuant to a letter of complaint from Judge Leval, four separate charges were filed against respondent in a Federal Disciplinary Proceeding. Thereafter, at the Federal disciplinary hearing on January 9, 1985, respondent, pursuant to a plea bargain agreement, admitted the second charge, namely that he prepared, swore and caused to be served an affidavit without personal knowledge of the facts therein, in exchange for dismissal of the other federal disciplinary charges. On November 4, 1985, the Committee on Grievances of the Southern District recommended a sanction that a formal letter of reprimand be issued to respondent and that this letter be made a matter of public record. A subsequent letter of censure was written and distributed by Judge Vincent L.

Broderick, Chairman of the Committee on Grievances on June 23, 1986.

Thereafter, the Departmental Disciplinary Committee filed a petition in this Court seeking the imposition of reciprocal discipline pursuant to 22 N.Y.C.R.R. § 603.3. Respondent objected to the imposition of discipline greater than that imposed by the federal disciplinary committee. By order entered February 20, 1987, this Court denied the Committee's petition and directed that the *Mowen* matter be referred to the Departmental Disciplinary Committee "for investigation and hearings, if necessary, as to *all the issues raised*."

Count One

The essential elements of Count One are that respondent intentionally caused to be placed into the jury room, during deliberations, an exhibit (PX-337B) when he knew that same had not been received in evidence, and the placing of said exhibit was done with full awareness that it was in violation of the Court's order and ruling as to the receipt of the exhibit in evidence.

Viewing all of the evidence under a "fair preponderance" standard, the Special Referee found that the Committee had failed to establish that respondent intentionally sent exhibit 337(B) to the jury room. As such, Count One was not sustained.

Count Two

This Count concerned false statements made by respondent in his affidavit dated March 8, 1982, which respondent prepared, swore and caused to be filed in the

Mowen action in response to the post-trial motion concerning the discovery of the unauthorized exhibit in the jury room. Specifically, respondent was charged with swearing to facts, to wit, that Cuccia was responsible for sending the unauthorized exhibit into the jury room, about which he had no personal knowledge or factual basis, direct or indirect. Thus, it was alleged that respondent violated DR1-102(A)(5) (engaging in conduct prejudicial to the administration of justice); DR1-102(A)(6) (engaging in conduct that adversely reflects on his fitness to practice law) and DR7-106(C)(1) (stating or alluding to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence).

The essential elements of Count Two, except for slight modification, are word-for-word identical to the second charge issued by the Federal Grievance Committee to which respondent admitted and for which he was sanctioned. Relying on that admission by respondent, the Special Referee sustained Count Two.

Counts Three and Four

Count Three alleges that respondent acted with *reckless disregard* for the truth in making false statements about Cuccia in his March 8, 1982 affidavit without making any effort to verify them with Cuccia. As a result of his actions respondent was charged with violating DR1-102(A)(5) and DR1-102(A)(6).

In the alternative, Count Four alleges that respondent *knowingly* made false statements in his affidavit dated March 8, 1982. As a result, respondent was charged with violating DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(5) (knowingly making a false statement of law or fact

in his representation of a client), DR7-102(A)(6) (participating in the creation or preservation of evidence when he knows or it is obvious that the evidence is false), and DR7-102(A)(8) (knowingly engaged in other illegal conduct or conduct contrary to a Disciplinary Rule during his representation of a client).

Respondent's admission to the second Federal disciplinary charge that he had no personal knowledge or factual basis for asserting in his affidavit that Cuccia was responsible for putting Exhibit 337B in the jury room and that Cuccia had acted in the good faith belief that it was proper to send in the exhibit was relied upon.

In addition, in May of 1987, respondent waived immunity and testified before a Manhattan grand jury concerning the *Krieger* case. The prosecutor cross-examined respondent on various matters including the affidavit he submitted in the *Mowen* case. During his testimony before the grand jury, respondent admitted that his affidavit blaming Cuccia was false.

In addition to the false statements about Cuccia, it was alleged that respondent's affidavit contained numerous other false or misleading statements of material fact including (i) that Cuccia handled the exhibit marshalling process; (ii) that all of the exhibits going to the jury were made available to counsel; (iii) that defense counsel had access and opportunity to examine the exhibits before the Clerk moved them into the jury room; (iv) that the Clerk had checked with all counsel as to whether the plaintiffs' exhibits had been reviewed, and (v) that all counsel had assented before those exhibits were moved into the jury room.

These statements were contradicted by the testimony of

others present in the *Mowen* courtroom, who said that respondent was involved in the exhibit marshalling process--and the Clerk of the Court who stated that he relied completely on respondent in connection with the review of exhibits. Respondent's sworn statements in his affidavit about what transpired during the period when the exhibits were being collected are also directly at odds with his subsequent position that he was not present in the courtroom when these events were occurring.

Although alternative counts had been alleged against respondent of recklessly making false statements in his affidavit (Count 3) and knowingly making false statements in his affidavit (Count 4), the Special Referee sustained both charges. The Special Referee concluded that an attorney's submission of an affidavit blaming his co-counsel of so serious an act and purporting to describe his co-counsel's subjective state of mind without making any effort to confirm the truth with co-counsel, is certainly reckless in the circumstances. Based upon respondent's admitted conversation with Cuccia about the exhibit in question not being in evidence and the fact that many of the statements in respondent's affidavit were contradicted by the testimony of others present in the courtroom and the position subsequently taken by respondent, the Special Referee concluded that respondent knowingly made false statements in the subject affidavit.

Count Five

Count 5 concerned respondent's testimony at the July 20, 1982 hearing before Judge Leval held for the express purpose of taking evidence on the subject of the unauthorized exhibit in the jury room. Respondent testified that he was not present in the courtroom during the exhibit marshalling process.

Based upon this conduct respondent was charged with intentionally making a false and misleading statement while testifying under oath in violation of DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(5), DR7-102[A][6] [erroneously cited as DR1-702(A)(6)] (participating in the creation or preservation of evidence knowing or when it is obvious that the evidence is false) and DR7-102[A][8] ([erroneously cited as DR1-702(A)(8)] [knowingly engaging in other illegal conduct or conduct contrary to a Disciplinary Rule]).

Upon the evidence presented, the Special Referee found that respondent intentionally made false and misleading statements while testifying under oath and as such sustained Count five.

Count Six

Count six alleges that respondent failed to advise the court of inaccuracies in his affidavit, once having been informed through Mr. Cuccia that portions of the affidavit were inaccurate. As such, respondent was charged with violating DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(3) (concealing or knowingly failing to disclose that which he is required by law to reveal) and DR7-102(A)(6).

The record indicates that Mr. Cuccia returned from Europe on or about March 17, 1982 and when made aware of the contents of the affidavit submitted by respondent to Judge Leval challenged the contents of the affidavit. At no point prior to, during or subsequent to Judge Leval's hearing, did respondent take any steps to inform Judge Leval of Mr. Cuccia's position.

Based upon the evidence presented the Special Referee concluded that respondent knew or should have known of the inaccuracies of the allegations as set forth in the affidavit and in failing to rectify the record he violated the disciplinary rules charged. As such, count six was sustained.

Estate of Miriam Krieger v. City of New York - Counts 7 - 17

The respondent represented Miriam Krieger and the Estate of Aaron Krieger in a civil negligence lawsuit filed in Supreme Court, New York County. The plaintiff sought monetary damages for the death of Aaron Krieger, who fell down an elevator shaft on April 4, 1979. Named as defendants in the case were the City of New York which owned the building and Universal Elevator Company which had been retained by the City to maintain the repair of the elevator. Stanton Trading Corporation, a tenant of the building, and Aaron Krieger's employer at the time of his fatal fall, was impleaded as a third-party defendant.

A central issue in the plaintiff's claim against the City was whether the safety devices on the elevator were working properly at the time of Aaron Krieger's death. To establish its defense, the City, represented by Laura Shapiro of the Corporation Counsel's office, intended to call Michael Cohen, a Stanton employee at the time of the accident, to testify about the manner in which Stanton employees operated the elevator.

The respondent retained Mr. Elliot Goldman, a private investigator, to investigate the accident and prepare witnesses for trial. Respondent performed no background investigation of Mr. Goldman prior to retaining him. Mr. Goldman was given authority to compensate witnesses without prior approval from respondent or anyone in respondent's office.

Respondent did not give Mr. Goldman any guidelines to follow with respect to the interviewing of witnesses and the taking of statements.

Under the terms of the agreement with respondent, Mr. Goldman was promised only 50% of Goldman's hourly rate on billing but an additional 100% of this rate on accumulated hours if the case was successful.

During the course of the trial, Michael Cohen told Ms. Shapiro that respondent's investigator, Goldman was trying to bribe him. Thereafter, the New York City Department of Law and Department of Investigation commenced an investigation.

Cohen met with Goldman and respondent and secretly tape recorded their conversation. During the course of the conversation respondent asked Cohen to testify falsely about various matters, including whether he had ever met with respondent and whether Cohen had been offered or paid any money.

During the course of the trial, respondent failed to disclose to the court that another witness, Arthur Eilets, had testified falsely about significant credibility matters which respondent knew were false. Eilets also stated to Cohen in tape recorded conversations that respondent had "clued" him to give false testimony about certain substantive issues as well. The case eventually resulted in a mistrial, declared in January 1986.

Arthur Eilets and Elliot Goldman were indicted in February 1986 in connection with these incidents. Goldman was tried and convicted in April 1987 of bribery of a witness and solicitation of perjury. Respondent was also indicted for

subornation of perjury and other crimes for his role in the *Krieger* case, but was eventually acquitted of these criminal charges.

Counts Seven through Ten

Respondent was charged with soliciting or requesting, Michael Cohen, a prospective witness for the City of New York in the *Krieger* case to (a) give false testimony *at trial* that his only meeting with respondent consisted entirely of the discussion as to whether he, Cohen was required to meet with the Assistant Corporation Counsel (Count 7) and (b) give false testimony *at trial* that no one had paid or had offered to pay Cohen money in connection with his prospective appearance as a witness (Count 8). It was alleged that by his actions, respondent violated DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(4) (knowingly used perjured testimony or false evidence), DR7-102(A)(6) and DR7-102(A)(8).

In the alternative, respondent was charged with a) requesting Michael Cohen, a prospective witness for the City of New York to make false statements *to opposing counsel,* Laura Shapiro of the Corporation Counsel's office, that Cohen's only meeting with respondent consisted entirely of a discussion as to whether he, Michael Cohen, was required to meet with the Assistant Corporation Counsel (Count 9) and (b) requesting Michael Cohen to make false statements *to opposing counsel*, Laura Shapiro, that no one had paid or had offered to pay Michael Cohen money in connection with his prospective appearance as a witness (Count 10). As a result it was alleged that respondent violated DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(3) (concealing or knowingly failing to disclose that which he is required by law to reveal) and DR7-109(A) (prohibits suppression of any evidence that the lawyer or his client has a legal obligation to

reveal or produce).

Although Counts 9 and 10 were charged as alternatives to Counts 7 and 8, the Special Referee sustained all four counts. The Special Referee concluded after a reading of the tape and surrounding circumstances that it was clear that respondent was preparing Mr. Cohen to give false testimony at the *Krieger* civil trial. According to the Special Referee, the meeting met the test of coaching and instructing Mr. Cohen as to what to say on the witness stand, and further, offering Mr. Cohen a theory to reconcile any conflicting statements that he may have given.

The Special Referee further found that a direct misrepresentation of material fact to opposing counsel made at the direction of respondent with the intent to induce reliance thereon is unethical professional conduct.

Count Eleven

This count alleges that respondent solicited and requested Michael Cohen to give false testimony that he had been and recalled being present when Wilhemina Oliver, a Manager for the City of New York, was told of dangerous conditions concerning the elevator which was the site of the accident and that she promised to have those conditions corrected. Respondent was charged with violating DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(4), DR7-102(A)(6) and DR7-102(A)(8).

The Special Referee concluded that although the evidence submitted in reference to this charge was at times contradictory, the credible evidence established that respondent asked Mr. Cohen to testify falsely about Wilhemina Oliver, or at least, that respondent asked Mr.

Cohen to say things which Cohen did not know or believe to be true. As such, the Special Referee sustained count eleven.

Count Twelve

Count twelve alleges that respondent solicited and requested Arthur Eilets, a witness for the plaintiff in the *Krieger* case, to give false testimony. As a result, respondent was charged with violating DR1-102(A)(4), DR1-102(A)(5), DR1-102(A)(6), DR7-102(A)(4), DR7-102(A)(6) and DR7-102(A)(8).

There was no direct evidence to support this charge. What was relied upon was circumstantial evidence, that is, conversations between Cohen and Eilets, and Goldman and Eilets and the Special Referee found that the the essential elements of this Charge were not established by a preponderance of the evidence. As such, count twelve was not sustained.

Count Thirteen

This count alleges that respondent was present when a witness for the plaintiff, Arthur Eilets, gave material false testimony, which respondent knew to be false and he took no steps to reveal the fraud to the Court or the parties. As a result, respondent was charged with violating DR7-102(B)(2) (a lawyer who receives information clearly establishing that a person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal).

Respondent admits that he knew Eilets was lying when he testified at the *Krieger* trial, however, he did not believe that he was obliged to make some corrective disclosure to the court. Respondent's position was that his duty was excused

in this case because Eilets' false testimony went to collateral matters and because it was elicited on cross-examination, as opposed to direct examination, and thus the false testimony was not a fraud upon the Tribunal within the meaning of the disciplinary rule.

Counsel from the Departmental Disciplinary Committee, however, pointed out that Eilets' testimony was pivotal to the respondent's case. Eilets was respondent's lead-off witness, he was on the stand for four days, he was prepared for said testimony by respondent, and he was paid $1,900.00 plus a suit and transportation.

The Special Referee concluded that Eilets gave material false testimony which respondent knew to be false and took no steps to reveal said facts to the Court or parties and thus violated DR7-102(B)(2). As such count thirteen was sustained.

Count Fourteen

This count alleges that respondent failed to supervise and give appropriate instructions to his investigator, Elliot Goldman, with respect to, among other cases, the *Krieger* case. It was further alleged that respondent failed to take reasonable remedial action after it became apparent that Goldman was engaged in unethical and illegal behavior. As a result respondent was charged with violating DR1-102(A)(5) and DR1-102(A)(6).

The record indicates that respondent began using Goldman's services as a private investigator in 1979. Goldman eventually became respondent's primary investigator, working on ninety percent of respondent's cases. Respondent performed no background investigation of

Goldman and never discussed any guidelines for conducting interviews of witnesses or compensating them for expenses. A routine background check would have revealed that in 1972 Goldman had been indicted for bribing a witness in a personal injury case and that he had pleaded guilty to a lesser included charge.

Even assuming that respondent had no obligation to do a background check on Goldman, there came a point in time when respondent should have been alerted that Goldman was engaged in questionable activities and he should have taken action. In 1985, Goldman backdated a witness statement in the *Krieger* case and brought this fact to respondent's attention. Respondent was also made aware of the contents of a tape of a November 21, 1985 meeting between Goldman and Cohen wherein Goldman stated that Cohen was delighted with the money and that he [Goldman] can get him [Cohen] to sign anything. Respondent was also aware in February 1986 that Goldman was indicted for bribery of a witness based on the November 21, 1985 meeting with Cohen, yet he continued to use Goldman's services. Respondent claimed that it was not improper to continue to employ Goldman after he was indicted since there was no evidence of misconduct by Goldman after that point.

The Special Referee concluded that once respondent was made aware of Goldman's questionable activities, he had an affirmative duty to take reasonable remedial action to rein in and control Goldman as a private investigator. The Special Referee sustained count fourteen insofar as it alleged that respondent violated DR1-102(A)(5).

Count Fifteen

This count alleges that respondent improperly acquiesced in the payment of compensation to a witness in the *Krieger* case, namely one Arthur Eilets, contingent on the content of Eilets' testimony. Respondent was charged with violating DR7-109(c).

The Special Referee found that the amount of compensation paid to Mr. Eilets appeared to be generous, but he failed to find that the record substantiated the position that the payments were contingent on the contents of Eilets' testimony. As such, count fifteen was not sustained.

Count Sixteen

This count alleges that respondent entered into a contingency fee arrangement with Mr. Goldman, a non-lawyer, under which respondent agreed to pay Goldman an hourly rate and he would receive additional compensation over and above that rate contingent on the success of the litigation. Respondent was charged with violating DR3-102 which prohibits fee splitting with a non-lawyer.

The Special Referee found that it was clear that respondent's fee arrangement with Goldman was contingent on the outcome of the *Krieger* case, and it created an incentive for Goldman to make that outcome eventually beneficial to him and created the incentive to influence the testimony of a witness. As such, the Special Referee sustained count sixteen.

Count Seventeen

This count alleged that respondent offered and paid, and acquiesced in the payment of, unreasonable and excessive sums of money and other benefits to witnesses and prospective witnesses, in particular, fees to Joseph Ferranti, an elevator inspector employed by the New York City Department of Buildings, and payments to Mordechai Margolese, a co-worker of Aron Krieger and Mr. Eilets. Respondent was charged with violating DR7-109(c)(1).

Since the record indicated that payments were made to these witnesses without any consideration for their lost time and expense incurred, the Special Referee concluded that such were unreasonable and excessive. As such, count seventeen was sustained.

With respect to *Hill v. Solely, Supreme Court, Bronx County*, the Special Referee did not sustain any of counts Eighteen through Twenty-Three-relating to this litigation.

The Special Referee sustained fourteen of the twenty-three charges as set forth above.

Respondent is a graduate of Harvard Law School and became a partner in the Manhattan firm, which is today known as Phillips Nizer. He left Phillips Nizer in the 1960's to form his own firm where he has specialized in personal injury cases. He has submitted a plethora of references and letters attesting to his probity, character and skill.

On March 16, 1993, Special Referee Donald J. Sullivan issued his written report recommending that respondent should be suspended from the practice of law for a period of two years.

By petition dated April 23, 1993, the Departmental Disciplinary Committee now seeks an order confirming the findings of the Special Referee and imposing whatever sanction the court deems just and equitable, but no less severe than the two year suspension recommended by the Special Referee.

Respondent cross-moves for an order disaffirming the Special Referee's report as it relates to the findings of misconduct against respondent and dismissing all charges. In the alternative, respondent requests that if any charges are sustained, no more than a censure should be imposed as the sanction.

A review of the evidence presented to the Special Referee indicates that there is ample support for the Special Referee's findings that respondent is guilty of multiple serious violations of the Code of Professional Responsibility.

During the course of his representation of the plaintiff in the *Mowen* case, respondent made false statements without personal knowledge or factual basis in an affidavit to Judge Leval (the charge respondent admitted in the federal disciplinary hearing); respondent knowingly made false statements of fact in his affidavit to Judge Leval; respondent gave false and misleading testimony under oath to Judge Leval at a hearing; and respondent failed to notify the court of the false statements in the affidavit once he was informed by Cuccia that the affidavit was false. Respondent's actions in the *Mowen* case were detrimental to his client in that such resulted in the jury's award for certain losses being reduced, or in the alternative, if plaintiff did not agree to the reduction, a new trial would be ordered.

In view of the fact that count 3 (which alleges that

respondent acted with reckless disregard for the truth in making false statements in his affidavit) and count 4 (which alleges that respondent made false statements in his affidavit knowing that such statements were false) were charged and argued in the alternative, we find the referee's sustaining both counts to be inconsistent. In view of the admissions by respondent in count 2, and the testimony of others present in the *Mowen* courtroom which clearly indicated that respondent was involved in the exhibit marshalling process, we conclude that respondent intentionally made false statements in his affidavit and as such, we dismiss Count 3 and sustain Count 4. The act of respondent is either intended or not intended, it cannot simultaneously be both. (*People v Gallagher*, 69 NY2d 525, 529).

Respondent's claim that the evidence fails to establish that he intentionally gave false testimony to Judge Leval at the hearing on July 20, 1982 (count 5) is without merit. Respondent's testimony at the hearing that he was not present in the courtroom during the exhibit marshalling process was contradicted by the *Mowen* trial transcript which placed him in the courtroom throughout that period.

Respondent's claim that he had no duty to inform the court of the false statements in his affidavit (count 6) because he was only made aware of the fact that it was false on the eve of the hearing, is also lacking in merit. The record established that at some point after Cuccia returned from abroad on March 17, 1982 and prior to Judge Leval's hearing on July 20, 1982, respondent's partner, Eisenstein learned from Cuccia that Cuccia was outraged by the accusations made by respondent in the affidavit and communicated this information to respondent on July 9, 1982. On repeated occasions prior to the hearing, Eisenstein stated that he asked respondent to discuss this issue but to no avail. Moreover,

prior to learning of the falsity of the affidavit from Cuccia, respondent could not have believed what he wrote about Cuccia's state of mind since respondent admitted that he had conversations with Cuccia prior to the exhibit marshalling in which Cuccia acknowledged that Exhibit 337B was not to go to the jury.

As such, respondent clearly had a duty to inform Judge Leval of the false statements and he failed to do so.

With respect to the *Krieger* case, respondent solicited and requested Cohen, a prospective witness to give false testimony at the trial, respondent solicited and requested Cohen, a prospective witness to make false statements to opposing counsel; respondent failed to disclose to the court that one of the witnesses for the plaintiff gave material false testimony; respondent failed to supervise his private investigator; respondent engaged in fee-splitting with a nonlawyer and respondent paid unreasonable and excessive compensation to witnesses. As a result of respondent's actions a mistrial was declared in the *Krieger* case.

Counts 7 and 8 and 9 and 10 were respectively charged and argued in the alternative, but all were sustained by the Referee. However, the fact that respondent solicited Cohen to give false testimony at trial does not preclude the fact that respondent also solicited Cohen to make false statements to opposing counsel. Accordingly, the Special Referee properly sustained all four counts.

The balance of respondent's claims with respect to the sufficiency of the evidence supporting the remaining *Krieger* counts are without merit. The tape-recorded conversations between respondent and Cohen voluntarily made by Cohen, as part of a police investigation, were stipulated into evidence

by respondent and did not touch upon any attorney-client or work-product privilege.

Finally, respondent's argument that the application of the fair preponderance of evidence standard of proof in attorney disciplinary proceedings violates his due process rights under the United States and New York State Constitution has been rejected by the New York Court of Appeals. That Court has conclusively determined that the standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence. (*Matter of Capoccia*, 59 NY2d 549 [1983]). Of course, there is no requirement of a criminal conviction to sustain a charge in an attorney disciplinary proceeding. While respondent argues that the clear and convincing evidence standard should be adopted by this Court he has set forth no valid reason why this Court should entertain a change of the law in New York and apply a different standard.

The sanction of suspension from the practice of law for a period of two years recommended by the Special Referee is far too lenient given the serious violations of the Code of Professional Responsibility involved, which as the Special Referee noted, go to the heart of the ethical responsibility of a practicing lawyer. Respondent's violations include several acts of intentional dishonesty, including the filing of a knowingly false and misleading affidavit, the giving of false testimony at a hearing before then Southern District Judge Pierre N. Leval, and the solicitation of false testimony from a fact witness.

Any one of these many serious violations would be ground for removal of respondent from the roll of attorneys. The fact that there were many discrete acts of misconduct leads ineluctably to the conclusion that the only just punishment for respondent must be disbarment. (*See, e.g.*,

Matter of Kleiman, 107 AD2d 241). As we noted over seventy years ago, false testimony, even if not technical perjury, and the making of false affidavits *should* result in disbarment (*In the Matter of Popper*, 193 AD 505). "The giving of false testimony strikes at the very heart of the judicial system. That an officer of the court should countenance it in another is intolerable. That he should himself be guilty of such an offense against good morals and the public weal is not to be condoned. By such conduct he has forfeited the confidence of the court and his right to its continued certificate of good character and integrity" (*Id.* at 512).

In a similar case, in which we disbarred an attorney, we noted: "The concededly false answers given and respondent's lack of candor, whether technically perjurious or not breached the standards of professional ethics [citation omitted]" (*In the Matter of Dougherty*, 7 AD2d 163, 165; see also, *In the Matter of Kunstler*, 248 AD 393). To the same effect, in *Matter of Schildhaus*, (23 AD2d 152), we held: "An attorney is to be held strictly accountable for his statements or conduct which reasonably could have the effect of deceiving or misleading the court in the action to be taken in a matter pending before it. The court is entitled to rely upon the accuracy of any statement of a relevant fact unequivocally made by an attorney in the course of judicial proceedings. So, a deliberate misrepresentation by an attorney of material facts in open court constitutes serious professional misconduct [See *Matter of Rotwein*, 20 AD2d 428, 430. See, further, Drinker, Legal Ethics, p. 74; 7 C.J.S., Attorney and Client, § 23, p. 741]" (*Id.* at 155-156).

In the instant case, respondent was found to have lied at a hearing held by a judge of the Federal Court and to have submitted a knowingly false affidavit which unfairly and

reprehensibly cast his own guilt upon a blameless fellow member of the bar. In addition, respondent, *inter alia*, solicited and requested a witness to give false testimony at a trial and stood by when another witness gave material false testimony which respondent knew to be false without revealing the fraud to the court or the parties.

These acts constitute a pattern of conduct by respondent which demonstrate a contempt for the legal and judicial process as well as for the profession. "One need not be a lawyer to recognize the impropriety of such conduct. For an attorney practicing for nearly 40 years in this State, such misconduct is inexcusable, notwithstanding an impressive array of character witnesses who testified in mitigation" (*In the Matter of Cohen*, 118 AD2d 15, 48).

In view of these serious acts of misconduct which had the effect of perverting the administration of justice, we reject the recommended suspension of respondent and find that disbarment of the respondent is the only proper punishment.

The violations of the canons of ethics by the respondent were not simply inadvertent or solitary peccadillos. They consisted of a pattern of professional misconduct persisted in as a course of conduct for at least a decade. For this Court to impose any other sanction would ignore our responsibility to the legal profession and the public.

Accordingly, the Disciplinary Committee's petition to confirm the Special Referee's report is granted to the extent that the findings of the Special Referee sustaining counts 2, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 16 and 17 are confirmed; the Special Referee's finding with respect to count 3, as well as the recommended sanction of suspension for a period of two years are disaffirmed. Respondent's cross-motion for an

order disaffirming the Special Referee's report as it relates to the findings of misconduct against respondent is granted only to the extent of disaffirming the finding as to Count 3 and in all other respects respondent's cross-motion is denied. Respondent is disbarred and his name ordered stricken from the roll of attorneys in the State of New York.

All concur.
Order filed.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 22, 1994

Present - Hon. Francis T. Murphy, Presiding Justice
Joseph P. Sullivan
John Carro
Sidney H. Asch
Israel Rubin, Justices

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In the Matter of Theodore H. Friedman
(admitted as Theodore Herzl Friedman),
an attorney and counselor-at-law:

Departmental Disciplinary Committee
for the First Judicial Department,
Petitioner,

M-2445
M-5413

Theodore H. Friedman, Esq.,
Respondent.

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The Departmental Disciplinary Committee for the First Judicial Department ("the Committee"), by Hal R. Lieberman, its attorney (Kenneth M. Bernstein and Jonathan K.M. Crawford, of counsel [Daniel L. Brockett, Special Trial Counsel), having presented a petition to this Court, on July 19, 1993, seeking an order pursuant to 22 NYCRR § 603.4(d) confirming the findings and conclusions of the Special Referee and imposing whatever sanction upon respondent, Theodore

H. Friedman (who, as Theodore Herzl Friedman, was admitted to practice as an attorney and counselor-at-law in the State of New York at a Term of the Appellate Division of the Supreme Court, First Judicial Department, on April 1, 1957), the Court deems just and equitable, but no less severe than the two-year suspension recommended by the Special Referee,

And respondent having appeared herein by Kramer, Levin, Naftalis, Nessen, Kamin & Frankel, his attorneys (Marvin E. Frankel and Michael S. Ross, of counsel), and having cross-moved for an order disaffirming the Special Referee's Report,

Now, upon reading and filing the papers with respect to said petition and cross-motion, and due deliberation having been had thereon, and upon the Opinion Per Curiam filed herein, and this Court having found and determined that in view of respondent's serious acts of misconduct which had the effect of perverting the administration of justice, the Court rejects the recommended suspension of respondent and it is unanimously

[M-2445/M-5413]

Ordered, that the application is granted to the extent that the findings of the Special Referee sustaining counts 2, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 16 and 17 are confirmed; the Special Referee's finding with respect to count 3, as well as the recommended sanction of suspension for a period of two years are disaffirmed; respondent's cross-motion for an order disaffirming the Special Referee's report as it relates to the findings of misconduct against respondent is granted only to the extent of disaffirming the finding as to Count 3 and in all other respects respondent's cross-motion is denied; and it is further unanimously

Ordered: that said respondent be and hereby is disbarred from practice as an attorney and counselor-at-law in the State of New York; that respondent's name be struck from the roll of attorneys and counselors-at-law in the State of New York; that said respondent be and hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another; that said respondent be and hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority; that said respondent be and hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto; and that said respondent be and hereby is directed, within 30 days of the date of this order, to fully comply with the provisions of Title 22, Section 603.13, of the Rules of this Court, a copy of which is annexed hereto and made a part hereof, all effective April 22, 1994.

ENTER:

/s/ CATHERINE O'HAGAN WOLFE Clerk

APPELLATE DIVISION SUPREME COURT FIRST DEPARTMENT
STATE OF NEW YORK

I, CATHERINE O'HAGAN WOLFE, Clerk of the Appellate Division of the Supreme Court First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on *3-22-94* and that the same is a correct transcript thereof, and of the whole of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on March 22nd, 1994.

/s/ CATHERINE O'HAGAN WOLFE
Clerk

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifth day of May 1994

Present, HON. RICHARD D. SIMONS, Senior Associate Judge, presiding.

Mo. No. 516
In the Matter of Theodore H. Friedman (Admitted as Theodore Herzl Friedman), an Attorney and Counselor-at-Law.
Departmental Disciplinary Committee for the First Judicial Department,
Respondent,
Theodore H. Friedman, Esq.,
Appellant.

The appellant having filed notice of appeal and a motion for a stay to the Court of Appeals in the above cause, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed, without costs, upon the ground that no appeal lies as of right from the unanimous

order of the Appellate Division absent the direct involvement of a substantial constitutional question (*see* CPLR 5601); and it is

ORDERED that the said motion for a stay be and the same hereby is dismissed as academic.

Judges Simons, Titone, Levine, Mercure and Crew concur. Chief Judge Kaye and Judges Bellacosa, Smith and Ciparick took no part.

/s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on June 7, 1994.

Present - Hon. Francis T. Murphy, Presiding Justice
Joseph P. Sullivan
John Carro
Sidney H. Asch
Israel Rubin, Justices.

In the Matter of Theodore H. Friedman
(admitted as Theodore Herzl Friedman)
a disbarred attorney:

Departmental Disciplinary Committee
for the First Judicial Department,

Petitioner

against

Theodore R. Friedman,

Respondent.

M-1814

The above-named respondent having moved for reargument of the order of this Court entered on March 22, 1994 which disbarred him as an attorney and counselor-at-law in the State of New York effective April 22, 1994,

Now, upon reading and filing the papers with respect to the motion; and due deliberation having been had thereon,

It is ordered that the motion be and that same hereby is granted solely to the extent of deleting the words "persisted in as a course of conduct for at least a decade" appearing in the second full paragraph on page 29 of this Court's Opinion Per Curiam accompanying the aforesaid order, and substituting therefor the words "persisted in as a course of conduct for at least several years", and said motion is otherwise denied in all other respects.

ENTER:

/s/ Catherine O'Hagan Wolfe
Clerk